

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 30, 2011 appellant, then a 55-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on that date she lost her balance, fell, and sprained her right wrist while in the performance of duty. She stopped work on December 1, 2011. OWCP accepted the claim for right wrist closed fracture lower end of radius, right rotator cuff tear, right shoulder sprain, and left shoulder rotator cuff tear. It paid appellant compensation on the supplemental rolls effective January 15, 2012, and on the periodic rolls effective February 12, 2012.

In a February 25, 2016 report, Dr. Gary Wexler, a Board-certified orthopedic surgeon, noted appellant's history of injury and medical treatment. He indicated that appellant was unable to stand for long periods of time or perform repetitive activities with her upper extremities. Dr. Wexler opined that appellant could not perform the work of a mail processing clerk due to the "multiple injuries to her musculoskeletal systems." He further noted that he did not believe that there was any type of accommodation that would enable her to work in this capacity.

On April 6, 2016 OWCP referred appellant for a second opinion examination with Dr. David B. Lotman, a Board-certified orthopedic surgeon, for an assessment of her work-related conditions.

In an April 26, 2016 report, Dr. Lotman noted appellant's history of injury and medical treatment. He related appellant's physical examination findings and indicated that appellant would be an excellent candidate for vocational rehabilitation and reemployment. Dr. Lotman explained that appellant had no current residuals of the accepted conditions, however, she could not be expected to have normal shoulder function and strength without provoking symptoms. He completed a work capacity evaluation (Form OWCP-5c) and indicated that appellant was capable of working an eight-hour day with restrictions on the right arm to include no more than one hour of reaching above the shoulder, no more than two hours of repetitive movements of the wrists, no more than two hours of pushing and pulling of 20 pounds or less, no more than two hours of lifting of no more than 20 pounds, and no climbing.

By letter dated June 3, 2016, OWCP provided a copy of Dr. Lotman's report to the treating physician, Dr. Wexler, and requested his opinion concerning Dr. Lotman's findings.

In a report dated August 25, 2016, Dr. Wexler related that appellant had no change in symptoms. He indicated that appellant's current diagnosis was right shoulder bursitis.

By letter dated October 24, 2016, the employing establishment offered appellant a position as a modified mail processing clerk and noted that the position was based on the restrictions outlined in Dr. Lotman's April 26, 2016 second opinion evaluation report. The duties of the position included one hour right and seven hours left of manual sorting letter and flats, scanning one to eight hours daily, answering badge intercom one to six hours daily, and registry and

assigning keys two hours right and six hours on the left. The physical requirements included two hours repetitive movement of the right wrist and elbows, one hour reaching above shoulder, two hours pushing and pulling no more than 20 pounds, lifting no more than 30 pounds, and no climbing.

In correspondence dated October 28, 2016, the vocational rehabilitation counselor noted that appellant did not accept the modified job offer because she was pursuing disability retirement. OWCP received a copy of an October 10, 2016 letter from Office of Personnel Management (OPM) which indicated that appellant's application for disability retirement had been approved.

OWCP afforded appellant proper notices on November 29, 2016 and January 4, 2017, with regard to the offer of suitable work. It advised appellant that the offered position was suitable, remained available, and that her wage-loss and entitlement to a schedule award would be terminated pursuant to 5 U.S.C. § 8106(c)(2) if she refused an offer of suitable work. OWCP received no further correspondence from appellant.

By decision dated January 25, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective January 25, 2017, as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position and had not resumed work following its 15-day notice letter. OWCP determined that the opinion of Dr. Lotman constituted the weight of the evidence and established that appellant could perform the duties of the offered position. It advised appellant that her refusal to accept the offered position because she was approved by OPM for retirement was not a valid reason for refusing the position.

On February 3, 2017 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 13, 2017.

By decision dated September 27, 2017, the hearing representative affirmed OWCP's January 25, 2017 decision. She found that there was no evidence that the offered position was not within appellant's medical restrictions as set forth by Dr. Lotman or that she could not perform the modified clerk position as offered. The hearing representative found that OWCP had complied with its procedural requirements to advise appellant of the offered position and provided her with an opportunity to accept the position or provide reasons for refusing the job offer and the penalty provision of 5 U.S.C. § 8106(c)(2). She also explained that accepting retirement was not a valid reason to refuse the job offer.

On September 18, 2018 appellant, through counsel, requested reconsideration. Counsel argued that the September 27, 2017 decision should be reversed. He contended that a conflict of medical opinion arose between the treating physician Dr. Wexler and second opinion physician Dr. Lotman; that the limited-duty job offer did not properly list Dr. Lotman's medical restrictions from the Form OWCP5-c; and that the job offer was made after appellant's OPM retirement was approved and she elected OPM benefits.

By decision dated July 26, 2019, OWCP denied modification of the September 27, 2017 decision.

On April 17, 2020 counsel for appellant requested reconsideration. On May 19, 2020 OWCP received a copy of a letter dated November 22, 2019 from counsel for appellant, reiterating his prior arguments that a conflict of medical opinion arose between the treating physician Dr. Wexler and second opinion physician Dr. Lotman, that the limited-duty job offer did not properly list Dr. Lotman's medical restrictions on the Form OWCP5-c, and that the job offer was made after appellant chose OPM benefits and her OPM retirement was approved.

By decision dated May 21, 2020, OWCP denied counsel for appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128 (a). It found that she neither raised substantive legal questions nor included new and relevant evidence and the request was insufficient to warrant a review of the prior decision. OWCP explained that the arguments were previously considered in the July 26, 2019 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

³ 5 U.S.C. § 8128(a); *see J.C.*, Docket No. 20-0614 (issued February 10, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In support of his April 17, 2020 request for reconsideration, counsel repeated the same arguments from the prior reconsideration request. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. She merely reiterated the previously submitted arguments. OWCP considered and rejected these arguments when it denied modification of its prior decision. The Board has held that the resubmission of a previously considered argument does not require reopening of the claim for merit review.⁸

Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

Upon reconsideration, counsel for appellant did not submit any evidence in support of the claim. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3), *i.e.*, the submission of relevant and pertinent new evidence not previously considered by OWCP.

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied the request for reconsideration without reopening the case for review on the merits.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁸ See *I.M.*, Docket No. 20-0980 (issued February 2, 2021); *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 30, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board